IN THE HIGH COURT OF GUJARAT
AT AHMEDABAD

Date of decision: 21st November 1995

CRIMINAL APPEAL NO.577 OF 1988

THE HONOURABLE MR. JUSTICE A.N.DIVECHA

AND

THE HONOURABLE MR. JUSTICE H.R.SHELAT

Shri K.J.Shethna, Advocate, for the Appellant.

Shri S.R.Divetia, Additional Public Prosecutor, for the Respondent.

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1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the reporter or not?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involved a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made

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5. Whether it is to be circulated to the Civil Judge?

Coram: A.N.Divecha & H.R.Shelat, JJ.

(21st November 1995)

Oral Judgment: (Per A.N.Divecha, J.)

The judgment and order of conviction and sentence passed by the learned Sessions Judge of Valsad at Navsari on 18th June 1988 in Sessions Case No.37 of 1987 is under challenge in this appeal at the instance of the original accused.

2. The facts giving rise to this appeal move in a narrow compass. At about noon time on 29th March 1987 some young boys, most of them school-going, were playing with marbles near the house of the appellant herein. One of them was Navnitbhai Bhikhabhai Patel. It appears that he was making shouts while playing. That presumably disturbed the appellant herein during his siesta. He therefore came out of his house and not only scolded the boys but also slapped said Navnitbhai. It appears that the boys were scared and they dispersed and went home. It appears that, later on, on inquiry, Navnitbhai appears to have informed his elder brother Rajubhai (the deceased for convenience), aged about 20 years, about the incident. The deceased thereupon appears to have gone to the house of the appellant herein to question him as to why the latter had slapped the former's younger brother. It appears that there ensued a verbal dual followed by a scuffle. In the meantime, the uncle of the deceased residing nearby is also reported to have reached the scene of scuffle. It appears that, in the scuffle between the deceased and the appellant, the former appears to have beaten the appellant herein. As a result the latter fell down. It appears that the deceased also slapped the appellant's younger brother. Thereupon, according to the prosecution version, the appellant went inside his house and he brought with him a knife and came near the deceased and gave a knife-blow just below the chest of the deceased on the left side near the sternum. The deceased fell down. A local doctor was sought to be summoned but he did not agree to treat the deceased. The deceased was thereupon carried to Civil Hospital at Navsari. He was found dead by the doctor seeing him. His dead body was sent for the necessary post mortem examination. In the meantime, the uncle of the deceased lodged his complaint with the police about the incident. The investigation machinery was thereupon set to motion. The necessary inquest panchnama and the panchnama regarding the scene of offence were drawn. The muddamal knife was recovered from the appellant on that very day around midnight. He was also taken into custody. On completion of investigation, the charge-sheet against the

appellant as the accused was submitted in the Court of the learned Chief Judicial Magistrate of Valsad at Navsari charging the appellant with the offence punishable under section 302 of the Indian Penal Code, 1860 (the IPC for brief). Since trial of the case was beyond the competence of the learned Magistrate, the case was committed to the Court of Sessions of Valsad at Navsari for trial and disposal. It came to be registered as Sessions Case No.37 of 1987. The charge against the appellant as the accused was framed on 30th April 1988. He did not plead guilty to the charge. Therefore, he was tried. After recording evidence and after recording the further statement of the accused under section 313 of the Code of Criminal Procedure, 1973 (the Cr.P.C.for brief) and after hearing rival submissions urged before him, the learned Sessions Judge of Valsad at Navsari, by his judgment and order of conviction passed on 18th June 1988 in the aforesaid Sessions Case, convicted the accused of the offence punishable under section 302 of the IPC and sentenced him to rigorous imprisonment for life. The aggrieved accused has thereupon invoked the appellate jurisdiction of this Court by means of this appeal.

3. Learned Advocate Shri Shethna for the appellant has taken us through the entire evidence on record in order to convince us that the prosecution cannot be said to have proved its case beyond any reasonable doubt. According to learned Advocate Shri Shethna for the appellant, the identity of the accused could not be established as it was a dark night and the lamp-post was not lit. Besides, it has been urged on behalf of the appellant that certain so-called eye witnesses cannot be styled as eye witnesses in view of certain basic infirmities in their depositions. As against this, learned Additional Public Prosecutor Shri Divetia has submitted that the learned trial Judge has carefully scanned and scrutinised the evidence on record and has recorded the finding of guilt against the accused and that finding of guilt is unassailable. According to learned Additional Public Prosecutor Shri Divetia, the impugned judgment and order of conviction and sentence passed by the learned trial Judge is quite in consonance with the settled principles of law in the light of the facts and circumstances of the case and it calls for no interference by this Court in this appeal.

4. As rightly submitted by learned Advocate Shri Shethna for the appellant, it was a dark night of Amavas and the lamp-post near the scene of offence was not lit at the relevant time as transpiring from the evidence on record. It is equally true that the incident resulting

in the homicidal death of the deceased occurred some time around 7.30 p.m. or soon thereafter on 29th March 1987. The incident occurred in village Simal taluka Navsari. That is somewhat on the western side of the country. In the last week of March, the sun would set some time around 6.40 p.m. and the day and the night would be somewhat equal at that time. Darkness would set in within half-an-hour's time thereafter. It cannot be disputed that by 7.30 p.m. it would be quite dark. That part of the submission urged before us by learned Advocate Shri Shethna for the appellant has to be accepted. It is however difficult to accept his submission that the identity of the accused at the relevant time would shroud in mystery on account of darkness at the relevant time. The reason therefor is quite simple. There are as many as six eye witnesses examined in this case. The suggestion to each of them was with respect to the weapon in the hand of the deceased and the in scuffle he fell down and was hit by his own weapon. The suggestion was further to the effect that the deceased was trying to attack the appellant with the knife in his hand and accidently he was injured by his own knife resulting in his death. This suggestion in the cross-examination would unmistakably establish his presence at the scene of incident at the relevant time. No suggestion whatsoever is put to any of the eye witnesses regarding any mistaken identity of the accused at the relevant time. On the contrary, suggestions made to the witnesses would go to show that parties knew each other very well, and as such there could not have been the case of any mistaken identity despite darkness. It may be remembered that the village wherein the incident took place was very small and inhabitants thereof would by and large know each other very well.

5. Besides, the case of mistaken identity does not appear to have been taken before the lower court. Whether or not it was a case of mistaken identity would depend on facts established at trial. It would essentially be a question of fact. We would have been disinclined to allow the learned Advocate for the appellant to raise such new plea of fact. However, even on facts, we find no substance in that plea.

6. We are supported in our view by the Division Bench ruling of the Orissa High Court in the case of HAZARI PARIDA v. STATE OF ORISSA reported in 1974 Criminal Law Journal at page 1212. In that case also, the question of identity of the culprit in the darkness of night was involved. In that context, it has been observed:

"Even in a dark night one can also recognise a known person from a short distance by the light of the stars".

We are in respectful agreement with the statement of law pronounced by the Division Bench of the Orissa High Court in its aforesaid ruling. It would be applicable in the present case. It is everyone's common knowledge that in March, more particularly on the western side of the country, sky is clear and cloudless. In a dark night the sky will be full of stars. It is possible that all stars might not start twinkling around 7.30 p.m. However, some bright stars would appear in the sky and villagers are by and large accustomed to recognise known persons even if a few stars are found twinkling in the clear and cloudless sky. As pointed out hereinabove, the incident occurred at about or soon after 7.30 p.m. on 29th March 1987. There could be a clear and cloudless sky. At least some stars might have started twinkling in the sky. Light emanating from such twinkling stars might be sufficient to identify the known persons in the village.

7. It is true that the so-called eye witness at Exh.13 has not seen the incident. It transpires from the deposition of the witness at Exh.23 that he was a tutored witness. We agree with learned Advocate Shri Shethna for the appellants that the evidence of the so-called eye witness at Exh.24 is also not reliable. The learned trial Judge has also made observations on the basis of the demeanour of the witness that the latter was found to be somewhat off the balance mentally. His oral testimony at Exh.24 can also be ignored on that count. As rightly submitted by learned Additional Public Prosecutor Shri Divetia, the ocular account of the incident given by prosecution witness No.2, named, Kanjibhai Govindbhai Patel, at Exh.9 and prosecution witness No.3, named, Navnitbhai Bhikhabhai Patel, at Exh.11 is quite cogent and convincing and both the witnesses have stood firm on their ground in their respective cross-examination. It is true that the witness at Exh.9 was the uncle of the deceased and the witness at Exh.11 was the brother of the deceased. Merely because they were related to the deceased is no ground to discard their evidence. Besides, their evidence is corroborated by the medical evidence coupled with recovery of the muddamal knife from the place shown by the appellant at the relvant time.

8. We do not agree with learned Advocate Shri Shethna for the appellant that the oral testimony of the prosecution witnesses at Exhs.9 and 11 cannot be relied

upon in view of certain infirmities found therein. It is true that both of them have stated that it was not completely dark at the relevant time though the incident occurred after 7.30 p.m. It is also true that the prosecution witness at Exh.9 has given a different version regarding the recovery of the muddamal knife from the appellant. These discrepancies found in the depositions of the witnesses at Exhs.9 and 11 are too trivial to be emphasised. We cannot overlook the fact that the witness at Exh.9 was aged about 50 with occupation of labour work. The witness at Exh.11 was aged 16 on the date of his deposition and was studying in Standard IX in the High School at Maroli. Their depositions were recorded on 16th May 1988, nearly 14 months after the date of the incident. The witness at Exh.11 would be around 15 years on the date of the incident. It would not be possible for him to remember with exactitude every minor detail resulting in the homicidal death of his brother. Similarly, it would be too much to expect from a labourer, presumably illiterate, to come out with the ocular account true in every detail, more particularly when residing in a small village. Minor and trivial discrepancies cannot shake the evidence of the witnesses otherwise found to be reliable and trustworthy. We do not propose to burden our judgment by quoting the classic passage from the binding ruling of the Supreme Court in the case of BHARWADA BHOGINBHAI HIRJIBHAI v. STATE OF GUJARAT reported in AIR 1983 Supreme Court at page 753. The sum and substance of the statement of law enunciated in the aforesaid binding ruling of the Supreme Court is that minor and trivial discrepancies in the evidence of witnesses need not be over-emphasised. In that view of the matter, we are of the opinion that the learned trial Judge has not gone wayward in holding the present appellant guilty of the homicidal death of the deceased.

9. We are however inclined to agree with the submission urged before us by learned Advocate Shri Shethna for the appellant to the effect that the knife-blow was not intended to kill the deceased. The reason therefor is quite simple. What was used as the weapon of offence was a small pen-knife with the blade of about three inches and the handle of the like length. One edge of the knife was blunt. It was practically a pen-knife. Looking to the size of the weapon of offence, the possibility of intended murder will have to be ruled out. Besides, it transpires from the deposition of the prosecution witness at Exh.9 that the deceased was tall and well-built. As pointed out hereinabove, it was dark

at the relevant time. That would rule out the possibility of any aimed blow at the relevant time. It is true that the appellant had in his hand at the relevant time a torch. It is however not the case of the prosecution that he had brought his torch along with the knife from his house for the purpose of using the torch to spot that part of the body for the purpose of aiming the knife-blow. Since it was dark at the relevant time, it would be but natural that the accused had a torch with him at the relevant time. That perhaps explains why he could not keep balance when beaten by the deceased in the scuffle between the two. As transpiring from the medical evidence, it was one single blow which killed the deceased. Taking into consideration the totality of the circumstances appearing on record, we are of the opinion that the accused, though killed the deceased by the knife-blow, did not intend to cause his murder. It was a case of homicidal death of the deceased falling within the purview of the offence punishable under section 304 Part I of the IPC.

10. Learned Additional Public Prosecutor Shri Divetia has shown to us the reasoning given by the learned trial Judge. Taking into consideration the circumstances highlighted by us for bringing of the case within the purview of section 304 Part I of the IPC, it appears that the learned trial Judge has not properly appreciated the surrounding atmosphere and the situation prevalent at the relevant time. In view of the evidence on record, it is difficult for us to concur with that part of the reasoning given by the learned trial Judge for holding the appellant - accused guilty of the offence punishable under section 302 of the IPC.

11. That brings us to the sentence to be awarded to the accused - appellant on his being found guilty of the offence punishable under section 304 Part I of the IPC. It is true that the punishment of rigorous imprisonment for life can be awarded to him thereunder. In the alternative, the punishment of rigorous imprisonment extending upto ten years can also be imposed upon him. So far as the offence punishable under section 302 of the IPC is concerned, the minimum sentence is imprisonment for life. The learned trial Judge has chosen to impose on the accused the minimum punishment for the offence punishable under the aforesaid statutory provision. The accused at the relevant time was aged 31 years. It is our common knowledge that young blood is capable of being provoked at the slightest possible irritation. The appellant herein got provoked at the disturbance caused by the brother (prosecution witness No.3 at Exh.11) of

the deceased around the noon time as aforesaid. The appellant again got provoked when the deceased picked up a quarrel with him over the trivial incident having occurrred at the noon time on that day. Coupled with that fact-situation was the fact that the deceased was well-built and tall. The accused appellant appears to have received a thrashing from the deceased resulting in the former's fall on the ground. That presumably explains the injuries found on his person. That appears to have provoked him. The incident in question appears to have occurred out of grave and sudden provocation caused to the appellant at the relevant time. It would not be in the fitness of things to award the lifer to the accused appellant for the homicidal death of the deceased on account of such grave and sudden provocation. The appellant accused was apprehended and taken into custody on the next day of the incident on 30th March 1987. He has not been released on bail at any point of time. More than eight-and-half years have rolled by since he has been languishing in jail. The alternative punishment that can be awarded to the accused for the offence punishable under section 304 Part I of the IPC would be imprisonment for ten years. With the grant of remission, the effective term of imprisonment would be around nine years. Since he has already undergone the imprisonment for more than eight-and-half years, it would be in the fitness of things to award to him the punishment of the imprisonment already undergone.

12. In the result, this appeal is partly accepted. The impugned judgment and order of conviction and sentence passed by the learned trial Judge on 18th June 1988 in Sessions Case No.37 of 1987 is modified by converting conviction of the appellants of the offence punishable under section 302 of the IPC to the offence punishable under section 304 Part-I thereof and by converting the sentence from rigorous imprisonment for life to the imprisonment already undergone. The remaining part of the impugned judgment and order is maintained. The accused appellant may be set at liberty if no longer required in any other case.

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